Supreme Court, U.S.
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No. 08-1512

In The

SUPREME COURT OF THE UNITED STATES

CYNTHIA GATES ET AL.,
Petitioner,

v.

SPEEDWAY SUPERAMERICA, L.L.C.
Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of the State of Ohio

PETITION FOR A WRIT OF CERTIORARI

David M. Lynch
29311 Euclid Avenue
Wickliffe, Ohio 44092
(440) 278-4246

Robert T. Lynch
Counsel of Record
2900 Fairmount Blvd.
Cleveland Heights, Ohio 44118
(216) 401-2488

June 1, 2009

Attorney for Petitioners

QUESTION PRESENTED

The Seventh Amendment to the United States Constitution guarantees that American citizens are entitled to a jury trial in civil actions at common law. The question presented is :

> Does the Seventh Amendment prohibit the Summary Judgment against Petitioner in her personal injury action against a liable gas station?

RULE 29.6 STATEMENT

Petitioners, Cynthia Gates and James Gates, are individual persons not subject to Rule 29.6.

Respondent is Speedway Super America, L.L.C., a Limited Liability Company, headquartered in Enon, Ohio and is a wholly owned subsidiary of its parent company, Marathon Oil Corporation, a Delaware Corporation.

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner respectfully petitions for a writ of certiorari to review the judgment and opinion of the Ohio Supreme Court decided on March 4, 2009 and the underlying decision of the Ohio Eighth District Court of Appeals decided on October 14, 2008.

OPINIONS BELOW

The Ohio Supreme Court did not issue an opinion but declined jurisdiction on March 4, 2009 in the Case No. 2008-2303. The opinion debated herein is that which was issued by the Eighth District Court of Appeals on October 14, 2008. This was an unreported decision in Case No. CA-07-90563, Journal Entry and opinion number 90563, and is reproduced in the Appendix to this Petition. (App. B). The trial court's decision is not reported but is also reproduced in the Appendix to this Petition. (App. C).

JURISDICTION

The judgment of the Court of Common Pleas, Cuyahoga County, Ohio, was entered on September 18, 2007. The Appellate Court of Ohio, Eighth District, entered judgment on October 14, 2008. The Ohio Supreme Court entered a final judgment on March 4, 2007. This court has jurisdiction under 28 U.S.C. Section 1257 (a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Seventh Amendment of the United States Constitution states:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

U.S. Constitution, Amendment VII.

Ohio Rule of Civil Procedure Number 56 states in part:

> "Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

It also states the following:

> "A Summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds cam come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor."

ORCP 56 (C).

STATEMENT OF THE CASE

This case presents an important issue regarding a citizen's right to her day in court. If the state of Ohio can deny

Cynthia Gates and her husband a chance to put their case before a jury, by abusing the Summary Judgment procedure, then our constitutional right to a jury trial means nothing.

On November 19 of 2004, Cynthia Gates was following her routine of stopping for gasoline before going on to her church. It was in the evening and it was dark. App. B.

Mrs. Gates was simply maneuvering around a poorly lit gas station island cramped with display cases. She had no choice because she needed gasoline. The poor lighting and poor surface condition caused her severe personal injury upon her fall, all due to the negligence of Speedway. App B.

Mrs. Gates continued to experience Medical problems emanating from this fall, along with other medical issues. In May of 2009, Mrs. Gates passed away, leaving behind her grieving husband, James, and her family of children and grandchildren.

Cynthia Gates alleges her fall of November 19, 2004 was caused by negligence of the Defendant. The negligence is found in the poor lighting and dangerous condition of the surface of the gas station and the gas pump islands. App. B.

Defendant filed a Motion for Summary Judgment claiming that the law absolved Defendants where an injured Plaintiff willingly walked into areas of poor lighting, Defendant noting that Mrs. Gates in her discovery responses said she stepped into "a black hole". App. B.

The Plaintiff filed a response to the Summary Judgment Motion in which Gates explains her "black hole" comment in an Affidavit, to show that the light was dim at an open, operating, gas station at night. App. B.

The Trial Court sided with Defendant, its Journal stating Plaintiff introduced "no evidence". See Journal of Trial Court attached to this Brief as App.C.

REASONS FOR GRANTING THE WRIT

RIGHT TO JURY TRIAL

The United States Supreme Court has a long history of respecting the right to a jury trial for common law actions. *Simmler v. Conner, 83 S. Ct. 609 (1963).*

In fact, the Seventh Amendment to the Constitution guarantees a trial by jury as a right in Civil Cases. *Granfinanciala, S.A. v. Nordberg, 109 S. Ct. 2782 (1989).* In *Dice v. Akron,* the Supreme Court declared that "trial by jury is a basic and fundamental feature of our system." *72 S. Ct. 312. (1952).*

Although many cases limit the Seventh Amendment to Federal Law matters, cases involving state law have been found to be within the purview of the Seventh Amendment.

An example of this is *Marra v. Philadelphia Housing Authority, 497 f. 3d 286 (3rd Cir. 2007).* In *Marra,* the Court applied the Seventh Amendment requirement for a Jury Trial even though it was Pennsylvania State law under interpretation. *Id.*

The Seventh Amendment creates an avenue for justice for civil common law plaintiffs like Mrs. Gates. Surely justice dictates the right to have the case heard on its merits by a jury.

THE SUMMARY JUDGMENT RULING WAS INCORRECT

This case is difficult to review because the Trial Court is so brief in its Journal Entry granting Summary Judgment. This is the entire entry of this Trial Court:

D1 SPEEDWAY SUPERAMERICA LLC MOTION FOR SUMMARY JUDGMENT MARSHAL M. PITCHFORD 0071202, FILED 7/16/2007, IS GRANTED EVIDENCE BROUGHT FORWARD BY DEFTS WAS NOT CONTRADICTED BY PLTFS' OPPOS. BRIEF AS IT INTRODUCED NO EVIDENCE. ON THE UNDISPUTED EVIDENCE, DEFTS ARE ENTITLED TO JUDGMENT IN THEIR FAVOR AS A MATTER OF

LAW. FINAL. COURT COST ASSESSED TO THE PLAINTIFF(S).

See Journal Entry of Trial Court of September 18, 2007. (App. C)

Plaintiff did submit the Affidavit of Cynthia Gates to offset Speedway's "voluntary walking into darkness" argument. Here is the entirety of the Affidavit statement made by Gates:

> **One.** That I have personal knowledge of the facts in this Affidavit and I am qualified to testify to their veracity.
>
> **Two.** That I can say this about the area in which I fell at Speedway in November of 2004: The area was dim but not in total darkness. If it were totally dark, the station would be closed for the night. The area was just dim. I said the proverbial "black hole" in my response to discovery to demonstrate that the light

was such that I couldn't avoid the area because there wasn't sufficient light.

If there is a material issue of fact, Summary Judgment must be denied under Civil Rule 56.

The record is undisputed that the case involves lighting at a Speedway Gas Station operating at night, inviting the public to its premises to buy gasoline and other products. Because Gates referred to the lighting problem as akin to stepping into a "black hole", Defendant asked for Summary Judgment based on a line of cases that says Plaintiff "assumes the risk" of entering dark areas.

The Gates Summary Judgment response distinguishes these cases from the facts, noting that this was an operating gas station and not a case of "open and obvious" conditions that Plaintiff should have avoided. App. B. The Trial Court, without explanation, seems to ignore the Gates Affidavit and says Gates presented "no evidence".

See Journal Entry of Trial Court, September 19, 2007. App. C

Even if the Court ignores the Affidavit, the transcript of Gates' deposition and her interrogatory responses were attached to Defendant's Motion for Summary Judgment. They are filled with Gates' sworn statements about her buying gas and falling due to insufficient lighting and a crack in the concrete. App. B.

Defendants also argued two completely opposite positions in its Brief related to the cracked concrete. First, it claims the crack was so big that it was "open and obvious". Then it claims it was a crack that was a "trivial defect". App. B.

Plaintiff's Affidavit does not address the crack issue because Defendant presents sworn statements from Gates that refer to this gigantic crack open and obvious and a "minuscule" crack. App. B. How can one possibly not find an issue of

material fact on the crack question, especially given these opposite descriptions presented in Defendant's Motion?

Plaintiffs merely argue this: There were material facts to be determined at Trial, and the Plaintiff did present evidence to show this.

THERE IS A DANGER TO SOCIETY IN EXTENDING THE PARKING LOT RULE

Proposition of Law: The parking lot illumination rule does not extend to gas station service islands.

In all of the cases that apply the rule that no duty exists to provided adequate lighting in parking lots, the emphasis has been on parking lot areas. *Asbaugh v Family Dollar Stores,* January 20, 2000, 4th Dist. No. 99 CA 11(Ohio 4th App. Jan. 20, 2000).

The theory of those cases is that consumers should be wary of dimly lit parking areas. *Jaswald v. Hutt* , 15 Ohio St. 2d 224, (1968) and *Scheetz v. Kentwood, Inc.,* 152 Ohio App.3d 20. (12th App. Ohio 2003).

On page 6 of the Court of Appeals opinion below, the Court refers to the dim "parking lot". This reference now attempts to convert a gas station service island into a "parking lot". What is the difference? App. B.

Normally, the differences between a parking area and the service island would be minimal. However, in this case, by calling the service island a "parking lot", the Court of Appeals has cloaked the service island with the protection of the "no duty to illuminate" rule. A service island is not a parking lot and nothing in the record says Plaintiff was in a parking lot.

This is a dangerous extension.

If a gas station is open at night, inviting the public, does not the owner at least owe a duty to light the gas pumping area?

Every member of this court has pumped gas at a service island. To allow extension of the "no illumination required" rule to those gas pumps is to expose millions to unnecessary danger.

CONCLUSION

For the reasons discussed above, this case involves matters of public and great general interest and a substantial constitutional question. The appellant requests that this court accept jurisdiction and grant Certiorari in this case so that the important issues presented will be reviewed on the merits.

Respectfully submitted,

Robert T. Lynch
Counsel of Record
2900 Fairmount Blvd.
Cleveland Heights, Ohio 44118
(216) 401-2488

David M. Lynch,
29311 Euclid Avenue # 200
Wickliffe, Ohio 44092
440-278-4246

COUNSEL FOR PETITIONERS

APPENDIX

Appendix A:

March 4, 2009 Supreme Court of Ohio Denial of Cert

Upon consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case and dismisses the appeal as not involving any substantial constitutional question.

Appendix B:

October 14 2008 Appellate Court of Ohio Opinion

ANTHONY O. CALABRESE, JR., J.:

Appellants, Cynthia and James Gates, appeal the trial court's grant of summary judgment in favor of appellee, Speedway Superamerica, L.L.C. Finding no merit to the appeal, we affirm.

This lawsuit arises from injuries sustained by Cynthia Gates in 2004, when she was a customer at the Speedway Superamerica service station ("Speeedway") in Richmond Heights, Ohio. At approximately 6:30 p.m. on November 19, 2004,[1] Ms. Gates stopped at Speedway to buy gasoline and two bottles of tea on her way to a church service. In order to pay for her purchase, she approached the cashier's window, which was located on a raised center island, her right foot became wedged in a four-foot long, half-inch wide crack, and she fell to the ground, injuring herself.

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[1] Although appellants' complaint alleges that the incident occurred on November 12, 2004 (see para. 1), Ms. Gates states that the incident occurred on November 19, 2004 in her Answer to Interrogatories, Ex. A.

On December 5, 2006, appellants brought a claim against Speedway for negligence stemming from its failure to adequately light the outside area of its service station and its failure to correct the defect in the pavement.[1] On July 16, 2007, Speedway moved for summary judgment on the grounds that it had no duty to illuminate its parking lot, the defect in the pavement was open and obvious, and the crack in the pavement was a trivial defect/ Speedway relied on the following evidence from Ms. Gates to support its motion.

Ms. Gates testified in her deposition that the height differential of the crack in the pavement was between one inch and one-and-one-half inches, that she had visited this Speedway many times before over the past seven years, that nothing distracted her attention prior to or at the time she fell, and that nothing obstructed her view of the crack in the pavement. She testified that the lighting in the areas was "dim" and that she placed her foot into "darkness" when she stepped off the curb.

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[1] Appellants originally filed suit in February 2006, but the court dismissed the case without prejudice.

On September 18, 2007, the trial court granted summary judgment to Speedway. In its entry, the trial court stated: "Speedway Superamerica LLC motion for summary judgment***is granted. Evidence brought forward by defts was not contradicted by pltfs' oppos[ing] brief as it introduced no evidence. One the undisputed evidence, defts are entitled to judgment in their favor as a matter of law." Appellants filed a timely notice of appeal.

Appellants raise one assignment of error, asserting that the trial court erred in determining that an affidavit from the injured plaintiff constituted "no evidence." We agree with the trial court that there are no genuine issues of material fact in this case and that Speedway is entitled to summary judgment as a matter of law.

"Civ.R. 56(C) specifically provides that before summary judgment may be granted, it must be determined that: (1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears form the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party."

Temple v. Wean United, Inc. (1977), 50 Ohio St. 2d 317, 327, 364 N.E. 2d 267.

It is well-established that the party seeking summary judgment bears the burden of demonstrating that no issues of material fact exist for trial. *Colotex Corp. v. Catrett (1986), 477 U.S. 317, 330, 106 S. Ct. 2548, 91 L.Ed 2d 265; Mitseff v. Wheeler (1988), 38 Ohio St. 3d 112, 115,526 N.E. 2d 798.* Doubts must be resolved in favor of the nonmoving party. *Murphy v. Reynoldsburg, 65 Ohio St. 3d 356, 1992-Ohio-95, 604 N.E. 2d 138.*

In *Dresher V. Burt, 75 Ohio St.. 3d 280, 1996-Ohio-107, 662 N.E.2d 264,* the Ohio Supreme Court modified and/or clarified the summary judgment standard as applied in *Wing v. Anchor Media, Ltd. of Texas (1991), 59 Ohio St, 3d 108, 570 N.E.2d 1095.* Under *Dresher,* "the moving party bears the initial responsibility of informing the trial court of the basis for the motion, *and identifying those portions of the record which demonstrate the absence of a genuine issue of fact of material element of the nonmoving party's claim."* Id. At 296. (Emphasis in original.) The nonmoving party has a reciprocal burden of specificity and cannot rest on mere allegations or denials in the pleadings. Id. At 293. The nonmoving party must set forth

"specific facts" by the means listed in Civ.R. 56 (C) show a genuine issue for trial exists. Id.

This court reviews the lower court's granting of summary judgment de novo. *Brown v Scioto County Commrs. (1993), 87 Ohio App. 3d 704, 622 N.E. 2d 1153.* An appellate court reviewing the grant of summary judgment must follow the standards set forth in Civ. R. 56 (C). "The reviewing court evaluates the record*** in a light most favorable to the nonmoving party***. [T]he motion must be overruled if reasonable minds could find for the party opposing the motion." *Saunders v. McFaul (1990), 71 Ohio App. 3d 46,50,593 N.E. 2d 24; Link v. Leadworks Corp. (1992), 79 Ohio App 3d 735, 741, 607 N.E. 2d 1140.*

The crux of appellants' argument is that the trial court ignored additional evidence they presented through the affidavit of Ms. Gates to create a genuine issue of material fact. We find this argument to be without merit. Ms. Gates' affidavit was written two months after her deposition and was subsequently attached to her brief in opposition to Speedway's motion for summary judgment. The affidavit attempts to clarify portions of Ms. Gates' answers to interrogatories, in which she stated that when she stepped off

the curb, "the lighting made [her] feel as is [she were] looking into the proverbial 'Black Hold of Space.'"[1]

In her affidavit, however, Ms. Gates states that what she meant was that "[t]he area was dim. I said the proverbial 'black hole' in my response to discovery to demonstrate that the light was such that I couldn't avoid the area because there wasn't sufficient light."

We do not believe the trial court abused its discretion by deciding that Ms. Gates' affidavit did not provide disputed factual issues sufficient to defeat summary judgment. *Cleveland Clinic Foundation v. Commerce Group Benefits, Inc., Cuyahoga App. No. 79909, 2002-Ohio-1414.* A nonmoving party may not defeat a motion for summary judgment by filing an affidavit which contradicts prior testimony.

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[1] At her deposition, Ms. Gates was questioned about this response when counsel for Speedway asked, "So is it your testimony that you stepped into darkness?" Ms. Gates responded, "Yes."

See Linder v. Am. Natl. Ins. Co., 155 Ohio Ap. 3d 30, 2003-Ohio -5394, 798 N.E. 2d 1190.[1]

Arguably, the clarification offered by Ms. Gates in her affidavit is not inconsistent with her prior responses since neither party argues that the entire Speedway parking lot was cast in total darkness. This court, however, conducts a de novo review, and we hold that the additional evidence presented in Ms. Gates' affidavit does not present a genuine issue of material fact and that Speedway prevails as a matter of law.

Appellants' complaint against Speedway alleges a single cause of action for negligence. It is elementary that to establish a cause of action in negligence, plaintiff must show: (1) a duty on the part of defendant to protect the plaintiff from injury, (2) a breach of that duty, and (3) an injury proximately resulting from the breach. *Huston v. Konieczny* (1990),52 Ohio St.3d 214,217,556 N.E.2a

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[1] Although the Ohio Supreme Court in *Turner v. Turner, 67 Ohio St. 3d 337, 1993-Ohio-176, 617 N.E. 2d 1123*, held that"[w]hen a litigant's affidavit in support of his or her motion for summary judgment is inconsistent with his or her earlier deposition testimony, summary judgment in that party's favor is improper because there exists a question of credibility which can be resolved only by the trier of fact," several appellate courts have upheld a lower court's decision to strike self-serving affidavits by a non-moving party when the affidavit testimony is inconsistent with prior testimony and no genuine issue of material fact is presented. *Cleveland Clinic Found.*, supra.

505; Jeffers v. Olexo (1989), 43 Ohio St.3d 140, 539 N.E.2d 614; *Thomas v. City of Parma* (1993), 88 Ohio App.3d 523,527,624 N.E.2d 337.

The rule in Ohio is that "'one who maintains a private motor vehicle parking area, for the accommodation of those he serves in a professional or business way, is generally under no legal obligation to illuminate the same at night.'" *Ashbaugh v. Family Dollar Stores* (Jan. 20, 2000), 4th Dist. No. 99 CA 11, quoting *Jeswald v. Hutt* (1968), 15 Ohio St.2d 224, 239 N.E.2d '37', paragraph one of the syllabus (darkness is always a warning of danger); see, also, *Scheetz v. Kentwood, Inc.,* 152 Ohio App.3d 20, 2003-Ohio-1209, 786 N.E.2d 501 ("because appellee had no duty to provide lighting in the restaurant parking lot, it could not have breached any such duty by failing to illuminate its parking lot on the night [plaintiff] fell"); *Meilink v. AAA Northeast Ohio* (Dec. 4, 1998), Lucas App. No. L-98-1139 (no duty to provide adequate lighting even if owner undertakes to provide some light in parking lot).

Regardless of whether the parking lot at Speedway that evening was dim, partially lit, or dark, we hold that Speedway did not owe Ms. Gates a duty to adequately light the area. Her testimony that she knew she was stepping into total darkness stands as warning enough that she needed to be more careful.

On an alternate theory, appellants claim the crack in the pavement allows recovery for Ms. Gates' injury. We disagree on two levels, both as to the length and width of the crack and as to the height differential it presented.[1]

The open-and-obvious doctrine provides that a premises owner owes no duty to persons entering those premises regarding dangers that are open and obvious. *Sidle v. Humphrey* (1968), 13 Ohio St.2d 45, 233 N.E.2d 589, at paragraph one of the syllabus. The rationale underlying this doctrine is 'that the open and obvious

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[1] Appellants argue that the defect cannot be both "open and obvious" and "trivial." However, we agree that the open and obvious doctrine and the two-inch rule regarding height differentials in pavement can co-exist and that "[a]lthough the rule and the doctrine are not the same, they share a key characteristic insofar as they both relieve a landowner of a duty to warn of certain potential hazards." *Henry v. Marriott Hotel Services, Inc.*, Montgomery App. No. 19653, 2003-Ohio-4840.

nature of the hazard itself serves as a warning. Thus, the owner or occupier may reasonably expect that persons entering the premises will discover those dangers and take appropriate measures to protect themselves.' *Simmers v. Bentley Constr. Co.*, 64 Ohio St.3d 642, 644, 1992-Ohio-42, 597 N.E.2d 504." *Boros v. Sears, Roebuck & Co.*, Cuyahoga App. No. 89299, 2007-Ohio-5720.

When applicable, however, the open-and-obvious doctrine obviates duty to warn and acts as a complete bar to any negligence claims. *Armstrong. Best Buy Co.*, 99 Ohio St.3d 79, 2003-Ohio-2573, 788 N.E.2d 1088.

Ms. Gates testified that the crack in the pavement was visible in daylight, that it was approximately four feet long and one-half inch wide, and that nothing obstructed her view of the crack. She also testified that, had she been looking where she was going, she would have seen the crack. As with the darkness argument, open and obvious hazards serve as warnings in and of themselves.

Further, the rule in Ohio is that business owners have no duty to repair a defect measuring two inches or less in height differential unless attendant circumstances exist making it reasonably foreseeable that the defect will cause an injury. *Henry,* supra; see, also, *Jeswald,* supra, ("(g]enerally, no liability exists for minor imperfections in the surface of such a parking area -- those slight irregularities reasonably to be anticipated in any traveled surface"). The presence of dim lighting does not necessarily change a minimal sidewalk defect into something creating a greater than normal risk of injury. *Goldshot* v. *Romano's Macaroni Grill,* Montgomery App. No.19023, 2002-0hio-2159.

Therefore, we hold that Ms. Gates' own testimony that the crack at Speedway had a height differential of between one inch and one-and-one-half inches relieves Speedway of any liability for the defect because it had no duty to repair the pavement. In addition, she has not argued that attendant circumstances existed since she testified that, if she had looked where she was going, she would have seen

the crack. We find that no genuine issues of material fact were raised by appellants and that the trial court did not err in granting summary judgment in favor of Speedway.

Judgment
affirmed.

It is so ordered that appellee recover from appellants costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

ANTHONY O. CALABRESE, JR., JUDGE

COLLEEN CO
MARY JANE B

Appendix C:

September 18, 2007 Trial Court Opinion (CUY. CO. OH)

D1 Speedway SuperAmerica, LLC Motion for Summary Judgment Marshal M. Pitchford 0071202, Filed 07/16/2007, is granted. Evidence brought forward by DEFTS was not contradicted by PLTFS' Oppos. Brief as it introduced no evidence. On the undisputed evidence, DEFTS are entitled to Judgment in their favor as a matter of Law. Final. Court cost assessed to the Plaintiff(s).

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ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF OHIO, CUYAHOGA COUNTY

BRIEF IN OPPOSITION

MARSHAL M. PITCHFORD
Counsel of Record
STEPHEN W. FUNK
ROETZEL & ANDRESS, LPA
222 South Main Street
Akron, OH 44308
(330) 376-2700

Counsel for Respondent

223976

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Whether the Seventh Amendment to the United States Constitution precludes an award of summary judgment against a claimant seeking a jury trial?

RULE 29.6 STATEMENT

Speedway SuperAmerica LLC is a Delaware limited liability company and qualified to do business in the state of Ohio. Speedway SuperAmerica LLC is a wholly owned subsidiary of Marathon Petroleum Company LLC which is a Delaware limited liability company.

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INTRODUCTION

Petitioners Cynthia and James Gates ("Petitioners") have presented no "compelling reasons" for why their Petition for Writ of Certiorari ("Petition") should be granted. This case simply involves a state court of last resort's proper application of Ohio common law. There is no federal question involved. Petitioners improperly frame the issue as a Seventh Amendment case, when in actuality this is a simple trip and fall claim, that should be, and has been, decided pursuant to Ohio state law.

Although Sup. Ct. R. 10 is not an exhaustive list of the types of cases over which the Supreme Court will exercise jurisdiction, none described in the rule apply here. This is not a case in which two federal court of appeal decisions differ. This is not a case where a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a federal court of appeal. This is not a case where a state court has decided an important question of federal law that should be settled by this Court or that conflicts with a prior ruling of this Court.

Respondent Speedway SuperAmerica, L.L.C. respectfully submits that this Court should not accept this case.

STATEMENT OF THE CASE AND FACTS

A. Summary of Proceedings

After both parties were afforded the opportunity to thoroughly brief the issues, the trial court granted Speedway SuperAmerica L.L.C.'s ("Speedway") Motion for Summary Judgment on September 18, 2007. Petitioners appealed that decision to the Eighth District Court of Appeals. In an opinion dated October 14, 2008, the Eighth District Court of Appeals extensively reviewed the record and affirmed the award of summary judgment in favor of Speedway. Appellate review of summary judgment motions is de novo. *Helton v. Scioto Cty. Bd. Of Commrs.*, 123 Ohio App.3d 158, 162, 703 N.E.2d 841, 843 (Ohio App. 4 Dist. 1997). "When reviewing a trial court's ruling on summary judgment, the court of appeals conducts an independent review of the record and stands in the shoes of the trial court." *Mergenthal v. Star Banc Corp.*, 122 Ohio App.3d 100, 701 N.E.2d 383 (Ohio App. 12 Dist. 1997). Thus, two courts independently reviewed this case in its entirety and reached the same conclusion.

Petitioners then appealed that decision to the Supreme Court of Ohio. On March 4, 2009, the Supreme Court of Ohio declined to exercise its jurisdiction.

B. Statement of Facts

This case arises out of an alleged trip-and-fall incident that occurred outside a service station on the evening of November 19, 2004. It was about 6:45 p.m. and dark, a fact of which Petitioner Cynthia Gates was

well aware. As she had done on a weekly basis for the seven (7) previous years, Petitioner Gates came to the Speedway service station to purchase gas. She had visited this same Speedway station over a hundred times before without any incident. She described herself as a "regular." She was admittedly "familiar" with the premises in both daytime and nighttime conditions and at all times of the year. The night in question was no different. According to her deposition testimony, she found the outdoor service station, the raised center island with the soft-drink coolers and display racks, and the driveway pavement all as she had every other night. Things were "as usual."

After pumping her gas, Mrs. Gates walked over to the soft-drink cooler on the raised island, stepped up onto the platform, and retrieved two bottles of iced tea. She turned and walked down the sidewalk/island approximately five steps toward the cashier's pay station. When she encountered a familiar display at the end of the island, she retreated approximately two steps, pivoted left, and, with her right foot, stepped down off the ledge.

As she stepped off the curb, the right side of her right foot came in contact with a four-foot-long, half-inch-wide crack. At this point, using Petitioner Gates' words, the height-differential between the two ledges was "miniscule." She then brought her left foot down from the raised island to the driveway/parking lot

surface, lost her balance, "teetered" for a few seconds, and fell. Petitioner Gates conceded that there was nothing distracting her attention at the time of her fall. Nothing obstructed her view of the crack.

Petitioners then brought suit and claimed that Speedway was negligent in lighting the outdoor service station and that the curb and crack constituted an actionable defect/danger. Speedway moved for summary judgment on the common law grounds of the "open and obvious" defense and/or Ohio's "two inch" rule. The trial court determined that Petitioners' claims failed as a matter of law, and the appellate court agreed.[1] The ruling was based entirely on state law and did not raise any federal question.

REASONS FOR DENYING THE PETITION

I. PETITIONERS HAVE NOT ADVANCED ANY COMPELLING REASONS AS TO WHY THEIR WRIT SHOULD BE GRANTED

Supreme Court of the United States Rule 10 states that a petition for a writ of certiorari will only be granted for "compelling reasons." Petitioners in this matter have failed to advance any compelling reason as to why their petition should be granted. As noted above, this case does *not* involve a situation where conflicting decisions between two federal courts of appeal exists, on the same issue. Furthermore, this case does *not* involve a state court of last resort deciding an important federal

[1] Petitioner Cynthia Gates claimed personal injuries while her husband, James Gates, advanced a loss of consortium count. Because the loss of consortium count was derivative, summary judgment on it was proper too.

question that conflicts with another state court of last resort or a federal court of appeal, or an important federal question that should be decided by this court.

Rather, this case involves a straightforward, state law trip and fall claim, in which summary judgment was properly granted in favor of the Respondent. Petitioners couch the issue in this case in a manner to lead this Court to believe that this is a Seventh Amendment claim, but that is simply not true. Indeed, Petitioners chief complaint is that summary judgment was improper. (Petitioners' Writ at 7). The Seventh Amendment does not prohibit a properly entered award of summary judgment. No court has ever held that. This case presents state law claims that were considered by three courts. Thus, the Court should deny the Petition too.

II. A GRANT OF SUMMARY JUDGMENT UNDER STATE LAW DOES NOT INFRINGE UPON THE RIGHT TO TRIAL BY JURY

Petitioners assert that this claim involves a "substantial constitutional question", and posit this Court to decide whether the Seventh Amendment to the United States Constitution prohibits an award of summary judgment against them. In support of their theory, Petitioners cite to *Marra v. Philadelphia Housing Authority*, 497 F.3d 286 (3rd Cir. 2007), seemingly for the proposition that they must be afforded a jury trial in this case. This is incorrect.

The original *Marra* action was brought in a federal district court. The claim went to trial before it reached the Third Circuit Court of Appeals. At trial, the district court permitted the Plaintiff's statutory claims to be heard by a jury, even though Pennsylvania law said that a claimant bringing a claim under that particular statute was not entitled to one. The district court concluded that it was not bound by Pennsylvania state law, and that the right to a jury trial in federal court is a matter of federal law.

The *Marra* Court noted:

> "The right to a jury trial in federal court, regardless of whether the claim arises under state law, presents a question of federal law," *In re City of Philadelphia Litigation*, 158 F.3d 723, 726 (3d Cir.1998) (citing *Simler v. Conner*, 372 U.S. 221, 222, 83 S.Ct. 609, 9 L.Ed.2d 691 (1963) (per curiam); *Cooper Labs., Inc. v. Int'l Surplus Lines Ins. Co.*, 802 F.2d 667, 671 (3d Cir.1986)), "even when a state statute or state constitution would preclude a jury trial in state court." *Gipson v. KAS Snacktime Co.*, 83 F.3d 225, 230 (8th Cir.1996) (citations omitted). This long-recognized precept is dictated by the clear command of the Seventh Amendment. *See* U.S. Const. amend. VII ("In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved. . . ."); *Simler*, 372 U.S. at 222, 83 S.Ct. 609 ("The federal policy favoring jury trials is of historic and continuing strength. Only through a

> holding that the jurytrial [sic] right [in federal court] is to be determined according to federal law can the uniformity in its exercise[,] which is demanded by the Seventh Amendment[,] be achieved.") (internal citations and footnote omitted).

The *Marra* Court concluded:

> In any event, long-standing Supreme Court precedent requires the application of federal law in determining the right to a jury trial in *federal court*, *Simler*, 372 U.S. at 222, 83 S.Ct. 609, and our decision in Bereda cannot, and should not, be understood to suggest anything to the contrary.

Marra is easily distinguishable from the case at bar, as this suit was brought in state court, not federal court. *Marra* dealt with the right to a jury trial in federal court, which is a matter of federal law, and in no way permeates the state law issues presented here.

Regardless, Petitioners' right to a jury trial was not infringed upon when a proper order of summary judgment was entered against them. In fact, the Supreme Court of Ohio, and countless other Ohio courts, have held as much. See *Houk v. Ross*, 34 Ohio St.2d 77, 83-84, 296 N.E.2d 266, 271 (Ohio 1973); see, also, *Univ. Carnegie Med. Partners v. Cleveland Therapy Ctr., Inc.*, Cuyahoga App. No. 61016 61463, unreported, 1992 WL 292270 (Ohio App. 8 Dist. Oct. 15, 1992); *Sawchyn v. Buckeye Union Inc. Co.*, Cuyahoga App. No. 50510, unreported, 1992 WL 104293 (Ohio App. 8 Dist. May 14, 1992).

Here, both the trial court and appellate court had an opportunity to review the Petitioners' state law claims, and the Supreme Court of Ohio declined to review the case. Both courts found that no issue of material fact existed to be litigated and that Speedway was entitled to summary judgment as a matter of state law. This determination does not violate the Petitioners' right to a jury trial. They were simply subject to Ohio common law defenses as a matter of law.

III. THE LOWER COURTS PROPERLY APPLIED OHIO STATE LAW IN DETERMINING THAT NO GENUINE ISSUES OF MATERIAL FACT REMAIN TO BE LITIGATED IN THIS MATTER, ENTITLING RESPONDENT TO JUDGMENT AS A MATTER OF LAW

Respondent Speedway moved for and was awarded summary judgment because Petitioners asserted that the company had a duty to provide a minimum level of outdoor lighting. Ohio law has no such requirement. *Sheetz v. Kentwood, Inc.*, 152 Ohio App.3d 20, 22, 786 N.E.2d 501, 503, 2003-Ohio-1209, at ¶9 (Ohio App. 11 Dist. 2003); see also, *Provateare v. Hausman Co.*, Cuyahoga App. No. 74061, unreported, 1999 WL 258194 at *2 (Ohio App. 8 Dist. April 29, 1999); *Schneider v. Associated Estates Realty*, Cuyahoga App. No. 73981, unreported, 1999 WL 126942 (Ohio App. 8 Dist. Mar. 4, 1999). Speedway also proved that the crack upon which Petitioner Gates tripped was less than two inches high and was open and obvious, barring liability.

In an attempt to get past summary judgment, Petitioners advanced the affidavit of Petitioner Cynthia Gates. The trial court found that this affidavit did not

generate an issue of material fact. The appellate court reached the same conclusion, and even noted that the affidavit improperly contradicted Cynthia Gates' prior testimony. The Supreme Court of Ohio declined to review the case. This case involves a state law trip and fall claim, that was properly decided within the confines of Ohio law. No "compelling" reason exists warranting review by this Honorable Court.

CONCLUSION

Petitioners have not established any compelling reason for this Court to grant their Petition. The Supreme Court of Ohio declined to review this matter, and this Honorable Court should as well. This case does not involve an important question of federal law. It is a simple trip and fall case, in which Ohio courts properly applied Ohio common law. Respondent Speedway Super America, L.L.C. respectfully requests that this Court deny the Petition.

Respectfully submitted,

STEPHEN W. FUNK
Counsel of Record
MARSHAL M. PITCHFORD
ROETZEL & ANDRESS, LPA
222 South Main Street
Akron, OH 44308
(330) 376-2700

Counsel for Respondent